84-1360

(16)

Supreme Court, U.S.
FILED
AUG 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF RENTON, *et al.*,

Appellants,

—vs.—

PLAYTIME THEATRES, INC.,
A Washington Corporation, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI*

The American Civil Liberties Union Foundation is a non-partisan organization of over 200,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. The ACLU of Washington is one of its state affiliates, with more than 6,000 members. The ACLU and its affiliates are devoted to defending freedom of expression under the First Amendment. They actively oppose laws and other official actions which limit the flow of information and the freedom of self-expression which the First Amendment guarantees.

The ACLU opposes all restrictions on the availability of books, films and

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* Counsel for all parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

other media based on their content. To the extent the courts permit any such restrictions, the ACLU opposes all efforts to expand the scope of permissible regulation. The argument in this brief is not based on the ACLU's opposition to all content-based restrictions on speech, but on currently recognized legal principles.

SUMMARY OF ARGUMENT

In Young v. American Mini Theatres, Inc., 427 U.S. 50, reh'g denied, 429 U.S. 873 (1976), this Court upheld the Detroit "Anti-Skid Row" Ordinance, which restricted the location of adult theatres and bookstores, as well as other businesses, holding that the Ordinance did not substantially restrict protected expression and was enacted to preserve the character of the City's neighborhoods. In this case, the record

demonstrates that Renton's ordinance has a much more severe effect on First Amendment rights. Because the area in which adult theatres are permitted to locate is either unavailable or obviously unsuitable for commercial uses, the effect of the ordinance is to ban such theatres from the City. The City's stated reasons for the ordinance are a mere pretext to cloak its obvious purpose, which is to stifle a form of protected expression.

Because its effects are much more severe than those of the Detroit Ordinance, the Renton Ordinance should be subjected to closer judicial scrutiny than the Court employed in Young. The four-part test developed in United States v. O'Brien, 391 U.S. 367, reh'g denied, 393 U.S. 900 (1968), should be used only when a government regulation of "nonspeech" elements of conduct

creates incidental limitations on First Amendment rights. Where a content-based regulation substantially limits free speech, it should only be upheld if it is narrowly drawn to serve a compelling governmental interest. The Renton Ordinance cannot withstand such close scrutiny.

Even under the more relaxed O'Brien standard of review, Renton must show the Ordinance furthers an important or substantial interest which is unrelated to the suppression of free expression, and does not unduly restrict First Amendment freedoms to serve that interest. The effect of the Renton Ordinance is not only to place adult theatres at a distance from residential neighborhoods, schools and churches, but also to remove them from the City's central business district and all existing commercial areas. The City cannot articulate any

substantial and legitimate interest which requires that adult theatres be separated from all non-industrial commercial uses.

The City relies on "evidence" from other cities allegedly showing that adult theatres cause deleterious effects. That evidence was employed to support zoning provisions which require the dispersal or concentration of adult entertainment uses, but Renton's ordinance has an entirely different effect. There is no empirical evidence of adverse effects resulting from the proximity of adult theatres to schools, churches, residential neighborhoods or shopping districts.

While Renton claims to have set aside an adequate and appropriate area for adult theatres, the record shows that area is neither adequate nor appropriate. The effect of the ordinance,

together with the history of its enactment, demonstrate that the City has exploited the tools of zoning law to accomplish an improper purpose. If the Court pierces the form of the ordinance to examine its substance, the improper motive and the drastic effects are clear.

The Magistrate and the District Judge reached entirely opposite conclusions regarding the purpose and effect of the Renton Ordinance, based on the same evidence. Because the interpretation of the evidence affects the determination of important First Amendment issues, this Court should conduct an independent review of the record to determine whether constitutional standards are met.

ARGUMENT

I. THE RENTON ORDINANCE SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY.

A. An Ordinance That Substantially Limits Protected Speech Must Be Narrowly Drawn To Serve A Substantial Governmental Interest.

When a zoning ordinance is challenged, "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest." Id. (footnote omitted).

The rule applied to zoning ordinances in Schad is consistent with the

Court's standard of review in other First Amendment cases. Statutes which regulate expression according to its content are generally subjected to strict scrutiny, and are held to violate the First Amendment and the equal protection clause of the Fourteenth Amendment unless they are narrowly tailored to serve a compelling governmental interest. Carey v. Brown, 447 U.S. 455, 461-65 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 94-99 (1972).

In United States v. O'Brien, supra, the Court developed a less stringent test for statutes involving only "incidental limitations on First Amendment freedoms." 391 U.S. at 376. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

nonspeech element can justify" such incidental effects. Id. The test provides that

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis supplied).

In his concurring opinion in Young v. American Mini Theatres, supra, Justice Powell applied the O'Brien test because he explicitly found the Detroit "Anti-Skid Row" Ordinance served interests other than the suppression of speech and had only an "incidental impact upon First Amendment interests." 427 U.S. at 74-75, 79-80; see id. at 62, 71 n.35 (plurality opinion); Schad,

supra, 452 U.S. at 71. Similarly, the Court applied the test in reviewing an ordinance which prohibited posting signs on public property in Members of the City Council v. Taxpayers For Vincent, _____ U.S. _____, 80 L.Ed.2d 772 (1984), because there was "no claim that the ordinance was designed to suppress certain ideas that the City [found] distasteful . . . " 80 L.Ed.2d at 786.

Here, Appellants urge the Court to apply the O'Brien test in order to avoid any searching inquiry into legislative motives. See Brief For Appellants, at 17, 36-38. Yet some inquiry into the purpose of the ordinance is necessary to determine whether the O'Brien test applies, because it applies only when the government regulates "nonspeech" elements of the conduct at issue. Legislative purpose is not irrelevant in

constitutional adjudication. Washington v. Davis, 426 U.S. 229, 244 n.11 (1976). The applicable standard of review should depend on whether it appears the government's purpose was to regulate expression or its "communicative impact."[1]

When a zoning ordinance has a substantial impact on protected forms of expression, the correct standard of

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1 Even a "facially neutral" government action "should . . . [be] subject to . . . more demanding scrutiny . . . [if it is] intended . . . to control or penalize the exercise of rights of expression or association." L. Tribe, American Constitutional Law, § 12-5 at 591 (1978) (footnote omitted). Professor Tribe explains that strict judicial scrutiny applies when government actions are aimed at the "communicative impact" of speech, and a less stringent balancing of interests occurs when they are aimed at "noncommunicative impacts." Id., § 12-2. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion).

review is set forth in Schad, Carey v. Brown and Police Department v. Mosley, supra: it should not be upheld unless its provisions are essential to serve a compelling governmental interest, and are narrowly tailored to serve that purpose.[2] The Renton Ordinance cannot satisfy that test.

B. The Renton Ordinance Has A Substantial Impact On Freedom Of Expression.

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2 The Renton Ordinance should not be measured by the standards applied to time, place and manner restrictions. The Court has held that a permissible restriction on the time, place or manner of expression "may not be based upon either the content or subject matter of speech." Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980); see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516-17 (1981) (plurality opinion). In addition, reasonable time, place and manner restrictions "must leave open adequate alternative channels of communication." Schad, supra, 452 U.S. at 75-76.

The Renton Ordinance restricts adult theatres to an area comprising about five percent of the City, which is remote from the downtown business district and other commercial areas. The unrestricted area is, with few exceptions, unavailable for sale or lease. (JA 217-24) It is largely undeveloped, has little or no vehicle or pedestrian traffic in the evening, and is poorly lit. (JA 30, 231, 241) A substantial portion is covered by railroad tracks and spurs; other portions include an industrial park, the overflow parking area for a horse-racing track, an oil tank farm, a sewage disposal site and treatment plant, and a manufacturing facility. (JA 57, 59-60, 63-64, 68-70, 88, 231, 241) Thus the U.S. Magistrate concluded, "The area is largely undeveloped and what development there is is entirely unsuitable for retail purposes

in general and for theatre purposes in particular." (App. 41a)

In Young, both the plurality and concurring opinions relied on the conclusion that the Detroit Ordinance did not substantially restrict market access for adult bookstores and theatres. Justice Stevens wrote, "There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." 427 U.S. at 62. The situation, he said, "would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 71 n.35; see Genusa v. City of Peoria, 619 F.2d 1203, 1212 n.18 (7th Cir. 1980). Justice Powell also stressed his conclusion that the ordinance would not reduce the number or

the accessibility of adult theatres, or "restrict in any significant way the viewing" of adult films. 427 U.S. at 78, 81 n.4. These statements obviously cannot be applied to the Renton Ordinance.

The Court should consider not only the quantity, but also the quality, of the area where adult theatres are permitted. A theatre is a commercial (retail) land use, which logically belongs in an accessible area where people congregate. One cannot expect the theatre to operate in an industrial park which is dark and deserted at night, any more than one might expect it to locate in a sewage disposal site. The only location in the permitted area which could possibly be viable for a theatre is occupied by two fast food restaurants. (JA 231-32) By limiting

adult theatres to "the most unattractive, inaccessible, and inconvenient areas of" the City, Renton effectively guaranteed that no viable location would ever be available. See Basiardanes v. City of Galveston, 682 F.2d 1203, 1212-13, 1214 (5th Cir. 1982) (ordinance limiting adult theatres to light and heavy industry zones effectively banned them). If the City could constitutionally ban an activity from "the places where it should most appropriately be conducted," then the activity truly would have no constitutional protection. New York State Liquor Authority v. Bellanca, 452 U.S. 714, 723 n.10 (1981) (Stevens, J., dissenting) (regulation prohibiting topless dancing where liquor is

served).[3] Renton went as far as it could go to prevent the establishment of adult theatres without explicitly banning them from the City. The ordinance drastically limits free speech, because it does not set aside any available area where theatres may reasonably be expected to operate. This drastic limitation calls for strict scrutiny by the Court.

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3 Justice Stevens wrote:

> If topless dancing is entitled to First Amendment protection, it would seem to me that the places where it should most appropriately be conducted are places where alcoholic beverages are served. A holding that a state liquor board may prohibit its licensees from allowing such dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment.

The severe effects of the Ordinance should not be discounted because they regulate a form of expression which many find offensive, see Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975), or because some sexually explicit films are on the "borderline" of "pornography," see Young, supra, 427 U.S. at 61, 70-71. While the plurality opinion in Young implies a greater willingness to tolerate regulations that have an incidental effect on free expression if the materials involved are on the "borderline" of obscenity, it does not suggest any tolerance for drastic limitations on sexually explicit expression. Id. at 71 n.35. If a city may constitutionally enact a de facto ban on "borderline" protected speech, then this Court's carefully fashioned definition of obscenity will no longer have any meaning.

II. THE PURPOSE OF THE RENTON ORDINANCE IS TO RESTRICT EXPRESSION.

The standard of review articulated in Schad v. Borough of Mount Ephraim, supra, applies to a zoning ordinance which substantially limits free expression. It does not require a detailed examination of legislative motive or purpose. Under Schad, because the Renton Ordinance effectively bans a form of protected expression from the City, it is not "narrowly drawn" to further any substantial governmental interest and therefore cannot be upheld. 452 U.S. at 68-74. The City's motives are relevant, however, under the alternative standard of review suggested by Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In Arlington Heights, the Court considered whether the Village's denial of a rezone application to permit an integrated low-income housing project was a denial of equal protection. Strict scrutiny was held appropriate "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision . . ." 429 U.S. at 265-66. That determination demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the impact of the government action, the historical background of the decision, the sequence of events leading up to the decision, and the legislative or administrative history. Id. at 266-68.

In Mt. Healthy, decided the same day as Arlington Heights, the Court applied a similar approach to a First Amendment claim. A teacher contended a school

board's refusal to renew his contract violated the First Amendment because it was motivated by his constitutionally protected conduct. The Court held plaintiff had the initial burden to show his conduct was protected and was a "substantial factor" or "a motivating factor" in the school board's decision.

> [Plaintiff] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.

429 U.S. at 287.

While Arlington Heights and Mt. Healthy involved administrative decisions, t' ir standard of review was extended to a legislative enactment in Hunter v. Underwood, _____ U.S. _____, 85 L.Ed.2d 222 (1985), where the Court considered whether a state constitutional provision disenfranchising

persons convicted of various crimes, though racially neutral on its face, denied equal protection because motivated in part by an intent to disenfranchise black citizens.

The Court may apply the Mt. Healthy standard of review as an alternative to the strict scrutiny suggested by Schad.[4] Under that standard, the

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4 The Schad standard is more appropriate because the Renton Ordinance has a substantial effect on free speech and discriminates on its face according to the content of expression. The Court's analysis of legislative motives in Arlington Heights, Mt. Healthy and Hunter was necessary because those cases involved governmental actions which had discriminatory effects but did not overtly discriminate. In Arlington Heights, the decision denying the rezone application did not explicitly mention the race of low-income tenants, 429 U.S. at 258; in Mt. Healthy, the school board did not explicitly punish the teacher solely for engaging in protected speech, 429 U.S. at 282-83 & n.1; and in Hunter, the state constitutional provision was racially neutral on its face, 85 L.Ed.2d at

record demonstrates that the suppression of free speech was "a motivating factor" in enacting the Ordinance. Therefore, the City should have the burden to show the ordinance would have been enacted in the absence of that purpose.

The predominant purpose, if not the only purpose, of the Renton Ordinance is to restrict or ban adult theatres. The drastic impact of the ordinance, discussed above, "may provide an important starting point" in determining the City's motives. Village of Arlington Heights, supra, 429 U.S. at 266. The failure to include restrictions on other land uses that are believed to cause crime or urban decay, but that do not

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(footnote 4, continued)

225, 227. The ordinance in this case is an explicit content-based regulation which should be measured against the standards of Schad, Carey and Mosley, supra.

involve protected speech, betrays the insincerity of the City's alleged concern for the quality of its neighborhoods. The City cannot "demonstrate that a uniform policy [regarding neighborhood preservation] in fact exists and is applied in a content-neutral fashion." Schad, supra, 452 U.S. at 84 (Stevens, J., concurring).

The legislative process began with a memorandum from the Mayor to the Council President, suggesting that the designation of "non-acceptable [adult] enterprises/localities" should occur before any adult business was licensed, because of the difficulty "some cities have had" passing ordinances "to respond to the public outcry" after such businesses were operating. (JA 411) The original ordinance was enacted with little public input and without any statement of purpose. (See JA 49-52) The Council's

rhetorical list of reasons was appended later, after the Appellees had commenced litigation against the City, to provide a post hoc justification. (App. 81a-86a, 88a-89a)

The "studies" relied upon by the City to support the ordinance involved very little empirical data. They consisted primarily of court decisions and legal memoranda describing the types of adult zoning ordinances which had been upheld by the courts. (JA 166-71) To the extent the "evidence" concerned the alleged "adverse secondary effects" of adult theatres, such effects were generally described without regard to where such theatres are located. (JA 70-72, 76-77, 133-34, 172-73, 174) For example, the testimony that adult theatres might cause an increase in certain crimes and lower property values

did not suggest it is more appropriate to place them in some areas than in others.

The City has cited no data specifically addressing the proximity of adult theatres to residential areas, schools, churches, etc. The evidence reviewed in Young concerned the effects of concentrating several adult theatres in a single neighborhood. 427 U.S. at 55, 71 & n.34 (plurality opinion); id. at 74-75, 81 n.4, 82 (concurring opinion). The other materials cited by the City are relied upon to support its conclusion that adult theatres may be harmful wherever they are located, and thus only demonstrate the City's interest in banning them entirely. See Brief For Appellants, at 22, 24-27.

As the U.S. Magistrate found, many of the policy statements grafted onto the ordinance after litigation commenced

are thinly veiled statements of distaste for the content of sexually explicit entertainment. (App. 44a) Some of the policy statements argue that adult theatres have negative effects, but are not tied in any way to where they are located. For example:

> 14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, has shown that location of adult entertainment land uses degrade [sic] the quality of the areas of the City in which they are located and cause a blighting effect upon the city. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect [sic] upon the City of Renton than other major cities due to the relative sizes of the cities.
>
> 15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.

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19. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.

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1. Many parents have chosen the City of Renton in which to raise their families because of the lack of pornographic entertainment outlets with its [sic] influence upon children external to the home.

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3. Citizens from other cities and King County will travel to Renton to view adult film fare away from areas in which they are known and recognized.

4. Property values in the areas adjacent to the adult entertainment land uses will decline, thus causing a blight upon the commercial area of the City of Renton.

(App. 83a-84a, 85a-86a)[5] Some of the policy statements are highly contrived, such as the suggestion that the presence of pornographic material in the City "has a degrading effect upon the relationship between spouses." (App. 86a)

Some of the policy reasons are improper on their face. For example, one statement argues that "students walking to school [should] not be subjected to confrontation with the existence of adult entertainment land uses." Another statement appears to make a similar argument about people walking to and from churches. (App. 82a,

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5 Some of the other policy statements are awkwardly phrased, giving the impression that references to "close proximity" to schools, churches and the like were inserted after the statements were drafted. (See statement no. 4, App. 82a; nos. 11, 12, 13, App. 83a; no. 6, App. 86a)

84a) These conclusions reflect only the notion that the outward appearance of an adult theatre is offensive to some people. See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 546-47 (Stevens, J., concurring); Erznoznik, supra,; Cohen v. California, 403 U.S. 15, 21-23, reh'g denied, 404 U.S. 876 (1971).

Of course, the City has not attempted in this ordinance to regulate the outward appearance of theatres. The ordinance discriminates among theatres solely by the content of the films shown inside. The style of the films themselves might be considered "ugly in a particular setting," as indecent language has been regarded, Consolidated Edison Co., supra, 447 U.S. at 547 & n.8, citing Federal Communications Commission v. Pacifica Foundation, 438

U.S. 726, 745-46 (plurality opinion), reh'g denied, 439 U.S. 883 (1978) (radio broadcast). But people passing by the theatre are not subjected to the films. They are subjected only to the message that adult films are shown inside.

In its concern for the effect of the theatres on passers-by, Renton has attempted to stifle the very message that adult films exist. This expresses the City's impermissible hostility toward the point of view of the theatre operator, who seeks to promote a lawful form of entertainment. See Young, 427 U.S. at 67, 70 (plurality opinion). The purpose is to suppress "the communicative aspects" of marquees and signs, a purpose which violates the First Amendment. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion).

The record does not show the City gave any consideration to selecting a geographical area where adult theatres were considered appropriate. (See JA 175, 176, 231, 241) The zone "set aside" for such theatres was not really set aside at all, but apparently was determined only by a process of elimination. (See JA 30-31, 201-02) City officials may have given thought to designating areas where adult theatres did not belong, but apparently no one ever considered whether the remaining area was suitable for theatres.

The scope of the Renton Ordinance is further evidence of its purpose. Its restrictions apply exclusively to activity involving free speech, while in Young Detroit only added adult bookstores and theatres to a list of other property uses (bars, hotels, pawn shops, billiard halls, secondhand stores, taxi

dance halls, etc.) that were subject to the same restrictions. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1021 (6th Cir. 1975) (Celebrezze, J., dissenting), rev'd in Young, supra.

These factors, taken together, suggest very clearly that the Renton City Council was motivated by hostility toward adult theatres, and not by any legitimate zoning concerns. The City has "[used] the power to zone as a pretext for suppressing expression." Young, 427 U.S. at 84 (Powell, J., concurring). "[W]hen the illicit motive of suppressing speech is apparent to the public or stands revealed with unmistakeable clarity, validating the law would serve to legitimate a transparent and potentially chilling abridgment of individual liberty." L. Tribe, American

Constitutional Law, § 12-6 at 595 (1978) (footnotes omitted).

III. THE ORDINANCE IS UNCONSTITUTIONAL UNDER THE O'BRIEN TEST.

Even if the Court applies the less rigorous test of United States v. O'Brien, supra, the Renton Ordinance still violates the First Amendment.

A. There Is Insufficient Evidence That The Ordinance Furthers An Important Interest Unrelated To The Suppression Of Free Speech.

Under the standards announced in O'Brien, Renton has the burden to show that the ordinance furthers an important or substantial governmental interest, that the interest is unrelated to the suppression of free speech, and that the restriction on First Amendment rights is no greater than essential to further that interest. As discussed above, the record demonstrates that the interest underlying the ordinance is not

unrelated to the suppression of free speech. However, decisions applying the O'Brien test have also considered whether the government has provided sufficient evidence to show that a statute actually furthers a permissible and substantial governmental interest.

Assuming for the purposes of argument that the Renton Ordinance is intended to prevent urban decay, to preserve residential neighborhoods, to prevent crimes, and to preserve property values, there is insufficient evidence that the ordinance actually furthers those interests.

In Young, "it was emphasized . . . that the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theatres in limited areas led to deterioration of surrounding neighborhoods . . . " Schad, supra, 452 U.S. at

71-72 (footnote omitted). The evidence considered in Detroit tended to show that the concentration of adult theatres in close proximity to one another caused certain negative effects; and in light of that evidence, Detroit provided that adult theatres, along with other land uses, must be located at minimum distances from one another.

In Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 719, 585 P.2d 1153, 1159 (1978), cert. denied, 441 U.S. 946 (1979), the state court found adequate evidence of "the effects of adult movie theater locations on residential neighborhoods." Relying on that evidence, the Seattle City Council enacted an ordinance requiring that adult theatres be located away from residential neighborhoods, and concentrated in the City's central business district. 90 Wash.2d at 711-13, 585

P.2d at 1155-56. (The area set aside by Seattle for adult theatres was arguably "appropriate" for such uses, because 10 of the City's 13 existing adult theatres were already located there. 90 Wash.2d at 711, 585 P.2d at 1155.)

The issue in these cases is not whether the empirical evidence supporting a legislative enactment is credible or disputed by experts, but whether it actually tends to support the action taken by a legislative body. If it does not, there is no well-reasoned and substantial basis for the statute or ordinance. As this Court noted in Erznoznik, supra, "even a traffic regulation cannot discriminate [against speech] on the basis of content unless there are clear reasons for the distinctions." 422 U.S. at 215; see Schad, supra, 452 U.S. at 68-70, 72-74.

Appellants argue that Renton is entitled to rely on empirical data from other cities to support its zoning ordinance. They emphasize that there were no adult theatres in Renton when the ordinance was first enacted, so the City had no actual experience with the effects of such theatres. The problem with their argument is not that the evidence derives from the experience of other cities, but that none of the evidence in the record supports the specific type of zoning ordinance which Renton chose to enact.

The evidence relied upon by Detroit supported the dispersal of adult theatres, but Renton does not require that adult theatres be located at any distance from one another. The evidence relied upon by Seattle supported a requirement that adult theatres be separated from residential neighborhoods

and concentrated in a central business district; but Renton has chosen to banish adult theatres from its central business district. Renton cannot point to any evidence considered by its City Council which deals with the alleged effects of adult theatres located in close proximity to parks, schools, or churches. The separation of adult theatres from those uses is justified only by vague and conclusory statements in the record.

Appellants rely extensively on Genusa v. City of Peoria, supra, 619 F.2d at 1211, where the Seventh Circuit said, "A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action." But that reasoning was employed only to sustain a Peoria provision which imposed the same requirement as Detroit's ordinance, the requirement

that "adult uses" be separated from one another. Id. at 1211-12 & n.18. Thus it offers no support for Appellants' position in the present case.

Most of the "evidence" on which the City relied was not evidence at all, but information regarding the types of ordinances that had been upheld when enacted by other cities. (JA 166-71) The remainder of the "evidence" consisted of conclusory statements that adult theatres cause harm, wherever they are located. (JA 70-72, 76-77, 133-34, 172-73, 174) The interest in keeping adult theatres out of the City entirely is obviously not unrelated to the suppression of free speech.

Renton did not attempt to determine whether the ordinance it enacted would accomplish any salutary goal other than the complete banishment of adult theatres. Its primary concern was to

pass an ordinance which appeared to serve legitimate zoning interests, and therefore would be held constitutional. This is not to suggest that it is improper for cities to consider constitutional issues in drafting legislation. But consideration of court decisions is no substitute for review of facts establishing the need for a particular zoning provision. The record simply does not support a finding that the Renton Ordinance furthers any interest other than the suppression of sexually explicit entertainment.

B. The Ordinance's Restriction On First Amendment Freedom Is Greater Than Is Essential To The Furtherance Of The City's Legitimate Interest.

Under the O'Brien test, even if the Court determines that the Renton Ordinance furthers an important interest unrelated to the suppression of free

speech, the ordinance can only be upheld if its restriction on First Amendment rights "is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377. This element of the O'Brien test requires the Court to balance the right of free expression against the City's asserted interests. See Young, 427 U.S. at 80 (Powell, J., concurring).

While the City has a legitimate interest in preserving the character of certain neighborhoods, it clearly has no legitimate interest in banning a protected form of expression on the basis of its content. See Schad, supra, 452 U.S. at 69-74. The availability of similar entertainment in nearby cities cannot justify a total ban. Id. at 76-77. Even if the Court does not agree that the Renton Ordinance amounts to a de facto ban on adult theatres, the

Court must consider how severely a city may restrict the location of businesses engaged in constitutionally protected activity. Under the O'Brien test, there must be some point, short of a total ban, where a zoning ordinance is too restrictive to be tolerated.

Here, the City not only has excluded adult theatres from any locations within 1,000 feet of residences, schools or churches, but also has banished them from all of its established retail shopping areas. Although the operative provisions of the ordinance do not mention the City's central business district, the City Council expressed in its statement of policy the concern that adult theatres would cause harm in "commercial areas of the City." (App. 82a, 83a, 86a) The record also shows the City made no effort to identify any area appropriate for adult theatres.

Because of the First Amendment interest at stake, the Court should at least require that any city which seeks to restrict the location of protected activities must undertake a good-faith effort to set aside a reasonably adequate area for such activities. The area set aside must not only be sufficiently large, but also reasonably appropriate for the type of activity involved. If the "commercial areas" of a city are placed off limits, then clearly the city has not attempted to accommodate theatre operators, because those are the areas where theatres reasonably can be expected to operate. (See JA 230)

Zoning ordinances present a special kind of problem under the O'Brien test. A wide variety of governmental interests can be asserted to justify a variety of restrictions. If there is no reasonable

attempt to accommodate activities protected by the First Amendment, then the ordinance by definition goes too far. Some of the interests asserted by the City in this case are not substantial and should be disregarded. While there may be a legitimate interest in removing adult theatres from residential neighborhoods, a provision requiring that they be located at least 1,000 feet from any residence does more than is necessary to further that interest. This is especially so when a city's commercial areas are located in close proximity to residences (see JA 42), so that the provision effectively bars theatres from commercial areas as well. By any reasonable standard, Renton has done too much to restrict adult theatres in its ordinance, and nothing to preserve their freedom of expression.

IV. INDEPENDENT APPELLATE REVIEW OF THE FACTS IS APPROPRIATE.

In Bose Corp. v. Consumers Union of United States, Inc., _____ U.S. ____, 80 L.Ed.2d 502, reh'g denied, _____ U.S. _____, 82 L.Ed.2d 863 (1984), the Court considered whether the evidence was adequate to show the defendant had published false statements regarding plaintiff's product with "actual malice." To make that determination, the Court reviewed the record independently, acknowledging "a constitutional responsibility that cannot be delegated to the trier of fact," whether jury or judge. 80 L.Ed.2d at 516-17. The Court noted:

> [I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression."

Id., 80 L.Ed.2d at 515 (citations omitted).

It was also appropriate for the Court of Appeals to review the facts independently in this case, where the determination of "ultimate facts" may control the outcome of another important First Amendment issue. The trial court's determination of the facts inevitably involved "broadly social judgments . . . lying close to opinion . . ." Id. at 516 n.16, quoting Baumgartner v. United States, 322 U.S. 665, 670-71 (1944). The fact that the District Judge and the Magistrate reached opposite factual conclusions from the same evidence demonstrates the role of subjective opinion in reaching those conclusions, and underscores the need for the appellate courts to review the record independently.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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DATED: Seattle, Washington
August 12, 1985

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